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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1905.

No. 75.

THE GUARDIAN TRUST AND DEPOSIT COMPANY AND THE GUARANTEE TRUST AND DEPOSIT COMPANY, PETITIONERS,

vs.

B. J. FISHER, A. M. SCALES, ASSIGNEE OF A. A. HINKLE, A. M. SCALES, ASSIGNEE OF HODGIN, PEGRAM & CO., AND HELEN G. BROWN.

On a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

BRIEF OF COUNSEL FOR RESPONDENTS.

AUBREY L. BROOKS,
Solicitor for Respondents.

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This cause comes up to the Supreme Court of the United States upon a certificate from the United States Circuit Court of Appeals, Fourth Circuit, under the provisions of an Act of Congress approved March 3, 1891.

The certified questions of law and the purposes therefor, are stated in the Certificate of the Court of Appeals, filed August 8, 1904, to be as follows, to-wit:

"This cause coming on for hearing before the court, after full argument, it is ordered, in view of the important questions aris-

ing from the record, and the doubt which the court has as to the correct decision thereof, that three questions raised on said appeal be certified to the Supreme Court of the United States for its consideration thereof; and that accompanying said questions, there shall be certified a statement from which such questions can be understood; which statement and questions are as follows:

QUESTIONS.

First. Whether the fact, that under the decision of the Supreme Court of North Carolina, an action can be and is maintained, by a citizen and tax-payer of the State, against a water company organized under the laws of the State, contracting with the city, (of which city said citizen is a tax-payer and inhabitant) to furnish the city and its inhabitants with water for domestic and public purposes, and also for the purpose of extinguishing fire, for damages occassioned by the burning of the building within the city belonging to such citizen and tax-payer, because of the alleged negligent failure to supply and furnish sufficient water and pressure from its engines and pumps to extiguish fires, the Circuit Court of the United States, sitting in equity in such case, in a suit for foreclosure of a mortgage given by the water company, should recognize the existence of such cause of action, and whether or not it is concluded by the rendition of a final judgment in the State Court in favor of the persons whose property has been destroyed by fire.

Second. Whether, because in said suit it was determined by the Supreme Court of the State that the judgment in such action was based upon a cause of action declared upon in tort, and not in contract, said Circuit Court of the United States is bound, and cannot for itself determine the question of whether the cause of action, if existing at all, was one arising in tort, or contract?

Third. Whether, assuming the existence of such cause of action, and that the same may be maintained in tort, a final judgment in such case against the water company obtained in the courts of North Carolina, is protected by section 1255 of the Code of that State, and should have priority in the distribution of the assets of the water company over its mortgage bonds theretofore issued".

Upon motion of appellants the Court on October 16th, 1905, granted a writ of certiorari directing that the entire record be sent up, which was accordingly done.

STATEMENT OF FACTS.

The questions presented arise upon a bill of foreclosure of a mortgage filed by the Guardian Trust and Deposit Company against the Greensboro Water Supply Company on the 29th day of September, 1900, in the Circuit Court of the U. S., for the Western District of North Carolina, the complainant as trustee holding certain bonds of the defendant company secured by a mortgage of the property, plant and franchise of the defendant company subordinate in lien to a mortgage executed upon the same property, plant and franchise by the Greensboro Water Company. A receiver having been appointed for the mortgaged property, a contract was entered into between the receiver and the City Council of Greensboro looking to the purchase of all the mortgaged property at private sale for the sum of seventy-five thousand dollars ($75,000.00). Upon applying to the Court for the approval and confirmation of this sale, it appeared that the Guardian Trust and Deposit Company of Philadelphia, trustee, holding the mortgage securing the fifty thousand dollars ($50,000.00) of bonds of the Greensboro Water Company, was a necessary party before such sale could be confirmed, an order was entered making this last named trustee a party. On its appearing and with its assent the proposed sale was approved and confirmed, the money derived therefrom to stand in the place of the property in all respects and to be subject to the further order of the Court. The bondholders and judgment creditors are contesting the question of the priority of payment of this fund, the amount being insufficient to pay all creditors.

ORGANIZATION OF THE GREENSBORO WATER COMPANY, ETC.

In 1887 a water company was organized in Greensboro, N. C., whose corporate purpose was to furnish that city and its inhabitants with water for domestic, sanitary and fire purposes. On the 29th day of December of that year the articles of agreement and letters of incorporation were filed with the Clerk of the Superior Court of Guilford County, in which Greensboro was, and the name of the "Greensboro Water Company" was given to the corporation. These articles and letters were amended and ratified by the General Assembly of North Carolina on March 3d, 1891, Private Laws of North Carolina, Chapter 166, pages 1009 and 1010. Very soon after its incorporation in 1887 the Greens-

boro Water Company secured the passage of an ordinance by the City of Greensboro under which it obtained a franchise and rights to the exclusive use of the streets, side-walks and public grounds for the purpose of constructing, operating and maintaining a complete system of water works. At the same time it obtained an agreement from the city to pay annually, for a term of years, money to the said company in consideration of the supply by the said company of hydrants in various parts of the city with an adequate water presure at all times to extinguish fire, and to keep its tower, reservoir, etc., supplied with water day and night, so as secure to the city and its inhabitants protection against fire.

After this contract was made the Greensboro Water Company exeuted a deed of trust to the Guardian Trust and Deposit Company of Philadelphia to secure the payment of bonds aggregating fifty thousand dollars, ($50,000.00) the deed covering all of its property and plant including the rights acquired by and under this said contract, and on the first day of May, 1891, the Greensboro Water Company executed a second deed of trust upon its plant to R. R. King and A. H. Taylor to secure a second bond issue of twenty thousand dollars ($20,000.00). In 1892 a bill was filed in the United States Circuit Court at Greensboro by J. W. Middendorf, et al. on behalf of holders of the bonds secured by a second mortgage and also as representatives of holders of bonds under the first mortgage against the Greensboro Water Company, seeking the appointment of receiver and praying for a sale of the property. The rights, status and wishes of the bondholders of the first mortgage is fully set out in paragraph six of said bill as appears upon pages 191 and 192 of the Record, to-wit:

"And your orators further aver that the only material and substantial interest in the property of the said defendant company other than the lien of the second said mortgage bond holders is the lien held upon the same by the said first mortgage bondholders hereinbefore referred to which are owned and held ten thousand dollars ($10,000.00) thereof by your orator, William C. Seddon, and fifteen thousand dollars (15,000.00) thereof by your orators, Jno. S. Gittings and Company, and twenty-five thosand dollars ($25,000.00) by persons for whom your orators Jno. S. Gittings and Company, are bankers and attorneys in fact, and entitled to represent and bind said owners in respect to said bonds, and, therefore, it is within the knowledge and power of your orators to aver in behalf of all said first mortgage bond-

holders, and they do aver, that they deem it for their interest and advantage, and assent to the appointing by this court of a receiver for the property of said defendant company as hereinbefore prayed and to a decree for the sale of the said property subject to the lien of the first mortgage under which said first mortgage bonds are secured".

A receiver, Jas. D. Glenn, was appointed to manage the property, but in 1895, under a decree of the Court, R. R. King and A. H. Taylor were appointed commissioners to sell the property, which sale took place on April 30, 1896.

At this sale Hugh L. Pope became the purchaser under an agreement had between all the bond holders, and all the parties interested made before the day of sale, Pope acting as the agent of all parties as appears from the testimony of A.H. Taylor, who was a stockholder in both the new and old companies, and also attorney and solicitor for the creditors and bond holders of the old Greensboro Water Company and one of the promoters of the re-organization scheme, who says: (See Record, page 93).

"The arrangement was really made prior to the sale. The holders of all of the securities of the old company, said, 'we will purchase or agree' (I was one of them to a small extent) 'agree to bid for the property through our agent, Mr. H. L. Pope, and to deliver to him all of the securities of the old company' so that he could, if necessary, bid up to the full amount of the stock and bonded indebtedness of the old company without paying cash, but, as I have said, there was a certain amount of cash which had to be paid before the holders of the securities of the old company could use them in payment for the property, and the understanding was that the cash which was advanced by various parties should be repaid in bonds of the new company of a prior lien to those given to the holders of the original securities of the Greensboro Water Company. That was the general plan of the organization. Of course there was a general understanding about it prior to the sale itself. It was carried out after the sale as near as possible"

ORGANIZATION OF THE GREENSBORO WATER SUPPLY COMPANY.

Conveyance having been made to Pope he at once conveyed the plant and all the property purchased to a corporation then and there formed, named the "Greensboro Water Supply Company". The conveyance to Pope and his re-conveyance to the new

company were expressly declared to be subject to the mortgage held by the Guardian Trust and Deposit Company of Philadelphia for fifty thousand dollars ($50,000.00).

Among the property conveyed in the deed of these commissioners, and also in the deed of Hugh L. Pope, was the contract for furnishing the city with water as above stated, and, of course, the franchise, under which the contract was made, (see provisions of deed from commissioners to Hugh L. Pope on page 117 of Record) and contract with the city, which was approved by the Court (see Record, page 203).

"Said Water Company shall be responsible for all damage sustained by the city, or any individual or individuals, for any injury sustained from the negligence of the said company, either in construction or in operation of the plant."

This contract having been so purchased and conveyed to the Greensboro Water Supply Company, this company assumed the same, and thence forward conducted its operations under its provisions, receiving the tolls from the city and from its inhabitants, and from these sources, principally paying the interest on the fifty thousand dollar first mortgage bonds.

On July 1st., 1896, the Greensboro Water Supply Company executed a deed of trust upon all its property, including the franchise, to the Guardian Security and Deposit Company of Baltimore, Md., to secure the payments of bonds to the amount of one hundred and ten thousand dollas ($110,000.00) in two series; the first series of eighty bonds known as esries A, and the other thirty as series B. Of series A. bonds to the amount of fifty thousand dollars was set apart to meet the fifty thousand dollar first mortgage bonds, as the conveyance was expressly said to have been made subject to this lien. The original first mortgage bonds, however, have never been retired.

CAUSES OF ACTION AROSE PRIOR TO FILING OF BILL, ETC.

Anterior to th filing of this bill in the month of June, 1897, two buildings in the City of Greensboro, with stocks of goods therein, were destroyed by fire. One of these buildings was owned by Charlotte Gorrell and the stock of goods therein by A. A. Hinkle, who had, prior to the fire, made an assignment to A. M. Scales. The other building was owned by Helen G. Browne and the goods therein by Hodgin, Pegram & Company,

who, after the fire, assigned all their interest to A. M. Scales. In the month of August, 1897, Helen G. Browne and A. M. Scales, assignee, instituted several suits, because of these fires, in the Superior Court of Guilford County, against the Greensboro Water Supply Company.

On the 17th. of June, 1899, another fire occurred in Greensboro, in which the property of B. J. Fisher, known as the Benbow Hotel, was partially destroyed by fire. On the 20th. day of July, 1899, Fisher also instituted suit against the Greensboro Water Supply Company because of this fire.

These cases were pending when the receiver was appointed for the Greensboro Water Supply Company, the answer having already been filed in the Fisher case, the receiver filing the answers in the Scales cases. (The receiver was also counsel for defendant company in all the cases).

At the ensuing Janaury term of the Superior Court of Guilford County the cases were heard and the issues submitted to the jury. In the several cases they found for the plaintiff, that is to say, for Fisher, twenty-five thousand dollars (25,000.00); for Scales, assignee of Hinekle Bros., thirty-two hundred dollars ($3,200.00); for Scales, assignee of Hodgin, Pegram & Company, eighteen hundred dollars ($1,800.00); and for Helen G. Browne, three thousand dollars ($3,000.00). Thereupon the plaintiff in each case submitted to the Court an order for judgment, in which, after reciting the issues found by the jury, it proceeds:

"It is, therefore, on motion of counsel for plaintiff, ordered, adjudged and decreed that the plaintiff recover of the defendant.....dollars damage *for the injury and damage done him by the negligence of the defendant*, and the cost of this action".

The Court refused to sign the judgment thus tendered because of the words italicized. An appeal was taken to the Supreme Court of North Carolina, and on hearing, the action of the lower Court in refusing to sign the judgment was held error, that the action was brought and properly brought in tort. This decision was filed in the Fisher case (128 North Carolina 375). Thereupon the appeals were withdrawn in the other cases, the Fisher decision having been agreed by all parties to settle the question.

The Code of North Carolina of 1883, Section 1255, governing this question, is in these words:

the United States as they have by *law* or *usage* in the Courts of the State from whence the said records are or shall be taken".

Mr. Justice Story in the leading case of Mills vs. Duryee, 7th. Cranch, 484, says, "It is argued that this Act provides only for the admission of such records as evidence, but does not declare the effect of such evidence when admited. This argumnt cannot be supported. The Act declares that the record duly authenticated shall have such faith and credit as it *has in the State Court from whence it is taken.* If in such Court it has the faith and credit of evidence of the highest nature, viz: record evidence, it must have the same faith and credit in every other Court. Congress has, therefore, declared the effect of the record by declaring what faith and credit shall be given to it. When Congress gave the effect of a record to a judgment it gave all the collateral consequences. There is no difficulty in the proof. It may be proved in the manner prescribed by the Act and such proof is of as high a nature as an inspection by the Court of its own record, or as an exemplification would be in any other Court of the same State"

"The last objection is, that the Act does not apply to Courts of this District. The words of the Act afford a decisive answer for they extend to "every Court within the United States". Were the construction contended for by the plaintiff in error to prevail, the judgments of the State Courts ought to be considered prima facie evidence only, this clause in the Constitution would be utterly unimportant and illusory. The common law would give such judgment precisely the same effect. It is manifest, however, that the Constitution contemplated a power in Congress to give a conclusive effect to such judgments. And we can perceive no rational interpretation of the Act of Congress unless it declares a judgment conclusive when a Court of the particular State where it is rendered would pronounce the same decision".

In a later case of Hampton vs. McConnell, reported in 3rd. Wheaton, page 234, Chief Justice Marshall, speaking of the above case delivers this short and conclusive opinion:

"This is precisely the same case as that of Mills vs. Duryee. The Court cannot distinguish the two cases. The doctrine there held was, that a judgment of a State Court should have the same *credit, validity and effect*, in every other Court in the United States, which it had in the State where it was pronounced, and

that whatever pleas would be good to a suit thereon in such State and none others could be pleaded in any other Court in the United States".

In the case of Crapo vs. Kelly, 16th. Wallace, page 610, the Court having under discussion the question of the faith and credit to be given a State Judgment declaring a lien upon a ship, in commenting upon the case of Mills vs. Duryee, say:

"Congress say the Court in that case, have declared the effect by declaring what faith and credit shall be given to the proceedings, so that it only remains, in every case, to enquire what is the *effect* of a judgment in the State Court where it is rendered. If a judgment is conclusive in the State where it was pronounced it is equally conclusive everywhere in the Courts of the United States".

Christmas vs. Russell, 5th. Wall, 302.

Justice Gray, in Hanley vs. Donoghue, 116 U. S., page 1, discussing the effect of State Judgments when offered for proof in other Courts says:

"Judgments recovered in one State of the Union when proved in the Courts of another, differ from judgments recovered in a foreign country in no other respect than that of not being *re-examinable upon the merits* nor impeachable for fraud in obtaining them if rendered by a Court having jurisdiction of the cause and of the parties".

McElmoyle vs. Cohen, 13 Pet. 312-324.

Thompson vs. Whitman, 18 Wall, 457.

In the last case cited, Mr. Justice Bradley, in discussing this question and the Act of Congress, says:

"It has been supposed that this Act in connection with the constitutional provision which it was intended to carry out, had the effect of rendering the judgments of each State equivalent to domestic judgments in every other State, or at least of giving to them in every other State the same effect, in all respects, which they have in the State where they are rendered".

And commenting upon the case of Mills vs. Duryee, continues:

"This decision has never been departed from in relation to the general effect of such judgments where the questions raised were not questions of jurisdiction".

Mr. Justice Story, who wrote the opinion of the Court in Mills vs. Duryee, in his commentaries on the Conflict of Laws in discussing the wisdom of this rule of law which give to foreign

judgments full faith and credit, uses the following language which is quoted with approval in the case of Hilton vs. Guyot, 159 U. S. by Mr. Justice Gray.

"It is, indeed, very difficult to perceive what could be done if a different doctrine were maintainable to the full extent of opening all the evidence and merits of the cause anew on a suit upon the foreign judgment. Some of the witnesses may be since dead; some of the vouchers may be lost or destroyed. The merits of the cause, as formerly before the Court upon the whole evidence, may have been decidedly in favor of the judgment; upon a partial possession of the original evidence, they may now appear otherwise. *Suppose a case purely sounding in damages*, such as anaction for assault, for slander, for conversion of property, for a malicious prosecution, or for a criminal conversation; is the defendant to be at liberty to retry the whole merits, and to make out, if he can, a new case upon new evidence? Or is the Court to review the former decision, like a court of appeal, upon the old evidence? In a case of covenant, or of debt, or of a breach of contract, are all the circumstances to be re-examined anew? If they are, by what laws and rules of evidence and principles of justice is the validity of the original judgment to be tried? Is the court to open the judgment, and to proceed ex æquo et bono? Or is it to administer strict law, and stand to the doctrines of the local administration of justice? Is it to act upon the rules of evidence acknowledged in its own jurisprudence or upon foreign jurisprudence? These and many more questions might be put to show the intrinsic difficulties of the subject. Indeed, the rule that the judgment is to be prima facie evidence for the plaintiff would be a mere delusion, if the defendant might still question it by opening all or any of the original merits on his side; for under such circumstances it would be equivalent to granting a new trial".

The judgment of a state court of Pennsylvania was held to be *res judicata* in a case in which a former judgment, the other way had been rendered in the United States Court in a case in which the same persons were parties, and this notwithstanding the fact that the Supreme Court of the United States says of the case in the state court:

"Such procedure, though not authorized by the practice of the Federal Courts, will be respected when the question arises upon the effect to be given to the Judgment".

Bryar vs. Campbell, 177 U. S. 648.

"If a Maryland court had jurisdiction to award judgment, it is valid and entitled to the same full faith and credit in North Carolina, that it has in Maryland as a valid domestic judgment".

Harriss vs. Baulk, 198 U. S. 215

"The judgment of a state court has the same effect, credit and validity that it has in the state where rendered and no more".

Hampton vs. McCall, 16 U. S. 3 Wheat. 234.
Mahue vs. Thatcher, 6 Wheat, 129.

In the last cited case Judge Marshall delivering the opinion of the Court said:

"That as by the local laws of Lousiana, questions of fact in civil cases were tried by the court, unless either of the parties demanded a jury, the interest upón the original judgment in Massachusetts might be computed and made a part of the judgment of Lousiana witout a writ of inquiry and the intervention of a jury, and that although the original suit was commenced by an attachment yet the defendant Mahue had personal notice of the suit and afterwards appeared and made defence, so that even supposing that there was any objection to the proceeding by attachment it was cured by the appearance of the defendant and his litigating the suit".

This court after quoting the provision of the Constitution of the United States, to the effect that full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state, and the Act of Congress passed to carry out that provision, says:

"The legislation of Congress amounts to this: That the Judgment of another state shall be record evidence of the demand, and that the defendant, when suing on the judgment can not go behind it to controvert the contract or other cause of action on which the judgment is founded; that it is evidence of the established demand, which, standing alone is conclusive between the parties to it".

The President and Directors of the Bank of the State of Alabama vs. Dalton., 9 How. 528.

The case of the Board of Public Works of Virginia vs. the Columbia College, 17 Wal. 521, was a case in which a party relied upon a judgment in the state court, which judgment it had been held by the court in the state in which it was rendered was merely interlocutory and not final. The Supreme Court of the United States held at page 691 as follows:

"At any rate, the complainant relying upon the decree of the court as evidence of his demand against Withers, invoking for it full faith and credit under the clause of the Constitution, can not object to the character which the highest court of Virginia and in other states, than the state in which the judgment is rention or weight. No greater effect can be given to any judgment of a court of one state, in any other state, than is given to it in the state where rendered. Any other rule would contravene the policy of the provisions of the Constitution and laws of the United States on this subject".

The converse of this proposition follows; that the same faith, credit and effect shall be given in the courts of the United States and in other states than the state in which the judgment is rendered, as is given to it by the courts of the state in which the judgment was had.

It is sought, by those who oppose the claims of the intervenors in this case, to make the case turn upon the question as to whether the United States Courts would be bound by the decisions of the state courts, if relied on as precedents, as to general questions of law not affecting the construction of Statutes, or provisions of the Constitution of the state rendering the decision. This point cannot be raised in this case for the reason that the judgments of the intervenors are not relied on merely as precedents, and persuasive authority in the United States courts, but they are *res judicata* of all matters decided in these cases, or which should have been pleaded and passed upon in the state court.

The attack upon the judgments of the intervenors in this case is purely collateral. The distinction between the decision of a state court relied upon merely as a precedent, and a judgment relied upon as being *res judicata* of all matters determined by the state court, is that in the former instance the courts of other states than that in which the judgment is rendered, and of the

United States, will follow them if they are construing state constitutions or laws of the state in which the judgment was rendered, or if the reasoning of the court commends itself to the court in which the judgments and decisions are cited, and in the later instance the judgments will be followed without regard to whether they are based upon sound principal, or whether there are apparent errors in the decision, if the court rendering the judgment and jurisdiction of the proceedings.

In the case of Chicago & Alton Railway Company vs. Wiggins Ferry Company, 108 U. S. 18, a suit had been brought by the Ferry Company against the Chicago & Alton Railway Company on account of the latter not exclusively patronizing the former's ferry across the Mississippi River at St. Louis, under an alleged agreement that it would do so. A judgment had been rendered in favor of the ferry company. In a subsequent suit between the same parties it was contended by the Railroad Company that the right of the Railroad Company to refuse to patronize the Wiggins Ferry Company was an open question. The judgment previously rendered was set up by the Ferry Company as an estoppel. The railroad thereupon applied to the state court for removal of the case to the federal court upon the ground that due faith and credit was not being given to the laws of Illinois where the ferry company was chartered and the case was ordered removed. The Circuit Court of the United States remanded the cause to the state court and there was an appeal to the Supreme Court of the United States and this court said:

"'In our opinion this is not a suit arising under the Constitution or laws of the United States, within the meaning of that term as used in the Removal Act. If the courts of Missouri gave a wrong construction to the laws of Illinois in the judgment set up as an estoppel, that error cannot be corrected by the means of a transfer of this suit from the state court to the Circuit Court of the United States. So long as a judgment stands, it cannot be impeached collaterly in the courts of the United States, any more than those of the state, by showing that if due effect had been given to th laws it would have been the other way. If it has the effect of an estoppel as is claimed, it will continue to have that effect until reversed or set aside in some appropriate form of proceeding instituted directly for that purpose. The court of the United States must give it the same effect as a judgment that it has in the court of the state. Whether as a judgment it operates as an estoppel, does not depend on the Consti-

tution or Laws of the United States. The correct decision of this question of estoppel, therefore, does not depend on the construction of the constitution or laws of the United States, but on the effect of the judgment under the laws of Missouri. The Public Acts of Illinois are in no way involved. If full faith and credit were not given to them by the Missouri court in the judgment which has been rendered, that may entitle the Railroad Company to a review of the judgment here on a writ of error, but in no other way can this or any other court of the United States invalidate that judgment on account of such mistakes, if any were in fact made".

There is an exhaustive note in the case of Kansas City Ft. S & M. R. Co. vs. Morgan in 21 C. C. A., page 478 citing many authorities sustaining the position taken by the intervenors herein.

Under the head of "*res judicata* as between federal and state courts," on page 480, the following language is used:

"It is now firmly settled that judgments of a superior court of record of several states are binding and conclusive in the federal courts when made a basis of *claim* or *defense*. That is to say such a judgment when pleaded in the federal court, is a bar to any other litigation of the same cause of action between the same parties, or, *as evidence*, it is conclusive upon parties and privies of all issues properly raised and determined in state court; and while the jurisdiction of the court which rendered the judgment may be challenged and inquired into, there can be no re-examination of the merits of the controversy if the court had jurisdiction of the parties and subject matter".

This proposition is sustained by numerous authorities cited. On page 482 it is stated:

"That a judgment of a state court set up as an estoppel cannot be corrected in a collateral proceeding in the court of the United States though the proceeding on which it is based may have been irregular. Although the judgment may be esteemed erroneous in law, these circumstances do not affect its conclusiveness. Until it is reversed or brought up for review in the manner provided by law it is entitled to the same effect in the federal courts as in the courts of the state".

If the decision of the Supreme Court of North Carolina in cases by the intervenors against the Greensboro Water Supply Company is to remain in force unless reversed for error in a direct proceeding, and cannot be collaterally attacked, then it is

res judicata that the intervenors are judgment creditors, regularly obtained upon a cause of action *ex delicto*, and they are entitled to whatever advantages accrue to such creditors of said corporation.

The fact that the bond holders are incidently affected by the character of this judgment can in no sense avoid the judgment. Of necessity every creditor of the common debtor is to some extent affected by the judgments held by the intervenors, but this is not a reason for failure to extend faith and credit to the judgments obtained as these were.

These judgments in favor of the intervenors in this case, therefore, stand upon the same footing as would a judgment obtained for negligence resulting from personal injury to one of the employees of the Greensboro Water Supply Company, or like judgments against a Railroad Company.

Chief Justice Fuller, speaking for the Circuit Court in the case of the Southern Railroad Company against Bouknight, reported in 70th. Fed. Rep., page 442, very clearly states the rule governing judgment creditors "filing claims for priority of payment over mortgage creditors" in cases like this to be:

"The judgment roll showed the date of suit brought, *the cause of action*, and when it arose, and the amount of the damages. The mortgagee was not, and could not have been made a party to that action at law; nor is this intervention a proceeding against the mortgagee to recover over in personam. To what extent third parties may go in impeaching judgments collaterally need not be discussed. There is no pretense here of want of jurisdiction, or of fraud, collusion, or gross neglect in obtaining the judgment, or of any irregularity invalidating it. The only way in which the judgment was questioned was by exceptions to the master's report, which raised objections to its admission in evidence, to its sufficiency as proof of the allegations of the petition to the award of priority, and that the master erred in not reporting that Bouknight, on the face of his petition, was guilty of contributory negligence, and not entitled to recover. The date of the mortgage appearing, the judgment record was sufficient to make out petitioner's case, if admissible in evidence; and we are clear that it was admissable under the statute, not simply as establishing the fact of its rendition, but as proof of when the action was brought, *what for*, and the amount. Being conclusive as to each of these matters as between the parties, it was certainly not less than prima facie against the mortgagee in respect of them, and that is enough to dispose of the inquiry here".

In the case of Central Trust Company against Charlotte C. & A. R. Co., reported in 65 F. R., Simonton, Circuit Judge, discussing the faith and effect which should be given to a judgment of a State Court presented to the United States Court for priority of payment over the assets of an insolvent corporation, says:

"His second proposition is that this judgment is res inter alios acta, and can be challenged by those claiming under the mortgage. The cause of action upon which this judgment was had was cognizable only in a court of law. The proceeding were in a court of law. To these proceedings the mortgage trustees were not only not necessary parties; they would have been improperly made parties, and the joinder would have been demurrable. When the mortgagees took this mortgage, they did so with notice *of the priority of this kind of judgment*, obtainable only in this way,—a way in which they could not be parties,—and with that notice and its consequences they accepted the mortgage. But this does not deprive the mortgage creditor of his property without due process of law. When, in marshaling the assets of this insolvent railroad company, the mortgage creditors and those claiming through them are met by this judgment and its claim to priority, they have the right to examine it, to look into the cause of action, to ascertain when and where the action was brought, to know if the conditions of the law existing when their mortgage was executed have all been complied with. They have the right to inquire into the jurisdiction of the court, and, above all, they are entitled to know that there was no fraud or collusion or gross neglect in obtaining the judgment. But, when all these are established, this judgment, when duly pleaded and proved in the court of the United States sitting in South Carolina, has the effect, not only of prima facie evidence, but of conclusive proof of the rights thereby adjudicated. A refusal to give it force and effect in this respect, which it has in the state in which it was rendered, denies the jdgment creditor a right secured to him by the constitution and laws of the United States.

Huntington vs. Attrill, 146 U. S. 685-686 13 Sup. Ct. 224.

"The judgment of the state court is produced in these proceedings, not in order to establish a demand against the mortgagees or their property, or to assail the validity of their mortgage, but for the purpose of showing that the claim of the petitioner comes

within the protection of the South Carolina statute. It is entitled to full faith and credit".

Petitioners in their contention that the United States Court should re-examine the cause of action upon which the intervenor's judgments were obtained, rely entirely upon the case of Hassell vs. Wilcox, 130 U. S., 493, and a few other cases in some of the circuits based upon the Wilcox case. A sufficient answer, however, to these citations and to this argument, will be found in a discussion of this case by Chief Justice Fuller in Southern Railway Company vs. Bouknight, supra, where this learned Judge says:

"In Hassell vs. Wilcox, 130 U. S., 493, 9 Sup. Ct. 590, the judgment in controversy was rendered on a complaint, counting on a note, the consideration of which appeared on its face to be in part for services which were not, and in part for labor claims which were,, entitled to preference under the statute of Texas involved in the case; and, this being so, it was held by the Supreme Court that the bondholders had the right to compel the plaintiff to prove affirmatively the amount for which he was entitled to a lien. *The case is peculiar*, and does not rule the point before us".

"The case is peculiar" and differs from the question at bar in other respects. For instance, the bondholders contested the judgment upon the grounds: First, that it was obtained by fraud and collusion between Wilcox and the president of the Company. Second, that the note upon which the judgment was rendered was without consideration and fraudulent. Third, that Wilcox falsely represented to the District Court that the note was for services and for amounts advanced which were entitled to priority as a lien, when, in fact, upon the face of it, the contrary appeared. And it further appears from a perusal of this case that Wilcox did not rely upon his judgment, but introduced evidence before the Master and demonstrated the falsity of his own judgment. Certainly no opinion upon this state of facts can be held to be conclusive upon the case at bar.

Against the judgments offered by the intervenors here there is no pretense of want of jurisdiction, or of fraud, collusion or gross neglect in obtaining the judgment, or of any irregularity invalidating it. Indeed, it appears affirmatively from the Record, that the receiver of the United States Court in the main cause appeared in the State Court and filed answers to the actions upon which these judgments were rendered. That the

"Mortgages of incorporate companies upon their property or earnings, whether in bonds or otherwise, hereafter issued shall not have power to exempt the property or earnings of such incorporations from execution for the satisfaction of any judgment obtained in the Courts of the State against such incorporations, for labor performed (nor for material furnished such incorporation) nor for torts committed by such incorporation, its agents or employees, whereby any person is killed, or any person or property injured, any clause or clauses in such mortgage to the contrary notwithstanding."

This section has been amended so as to eliminate the sentence in brackets. This section gives priority to judgments obtained against the corporation in preference to the lien of all mortgages against its property and earnings. In the case at bar there are two classes of mortgages; one class is a mortgage executed by the Greensboro Water Company, which has been *assumed* by the purchasing company, and the interest upon its bonds paid out of the earnings of said company, and the other is a mortgage executed by the Greensboro Water Supply Company, the successor of the Greensboro Water Company.

In the main case the Master was thereafter instructed to call in creditors, the bondholders coming in to prove their deeds of trust and their bonds.

Notices having been served on B. J. Fisher et al., judgment claimants, otherwise called intervenors, they severally filed their answers, together with proof of claims before the Standing Master, as set out in the Record.

Upon all the pleadings, petitions, papers, the testimony and proofs taken before the Master, and his report, the cause was set down for hearing before their Honors, Simonton, Circuit Judge, and Boyd, District Judge, at Greensboro. The said cause having been fully argued by counsel both for complainants and defendant respondents,—and the intervenors, the Court, upon due consideration, on the 24th. day of March, 1902, entered a decree giving priority of payment to the judgments of B. J. Fisher et al., appellees herein, over the bondholders, out of the fund in the custody of the Court arising from the sale of the property of the Greensboro Water Supply Company, upon the grounds, and for the reasons, stated in the opinion of the Court, as set out in the Record at pages 385 to 394 inclusive, from which decrees the Guardian Trust and Deposit Company, the complainants in the bill, and the Guarantee

Trust and Deposit Company, respondents, appealed to the Circuit Court, at Richmond, Va., where this cause was twice argued, and the Court being unable to determine the matters in controversy certified the foregoing questions.

ARGUMENT.

The central matter in dispute and to settle which these three questions have been certified by the United States Circuit Court to this Court for answer may be thus briefly stated:

The United States Circuit Court sitting in equity at Greensboro, North Carolina, now holds for distribution among creditors seventy-five thousand dollars ($75,000.00) in money derived from the sale of the plant and franchise of the Greensboro Water Supply Company.

The intervenors presented to the Court for payment their judgments set out in the Record duly authenticated and affirmed by the Supreme Court of North Carolina. *They are judgments in tort.* The Court below desires to know what faith and credit shall be given these judgments. The bondholders who oppose their payment contend that these judgments are not conclusive and that the facts upon which they were rendered may be re-examined by this Court.

We respectfully submit that the judgments here presented are not only decisive of the matters about which they purport to speak, but have the sanction and approval of the highest Court of the State of North Carolina, and as such are entitled to full faith and credit, when presented to the United States Court for payment.

The decisions of this Court, based upon the Constitution and Acts of Congress, we think are uniform and conclusive upon this question.

By the Constitution of the United States it is declared that "full faith and credit shall be given in each state to the Public Acts, records, and judicial proceedings of every other state; and Congress may, by general laws, prescribe the manner in which such Acts, records and proceedings shall be proved and the effect thereof". By the Act of May 26, 1790, Congress provided the mode of authenticating the records and judicial proceedings of the State Courts, and expressly declared "that the records and judicial proceedings authenticated, as aforesaid, shall have such faith and credit given to them in every Court within

As has been so tersely stated by the Supreme Court of North Carolina in Railroad vs. Bennett, 123 N. C., 214.

"The mortgagee always has the power to protect himself against such claims if he chooses to do so by foreclosing the mortgage, or by taking the property into possession, or by having a receiver appointed, and when the mortgagee is getting a part of the earnings by way of interest or otherwise, and prefers to allow the mortgagor to remain in possession and to run the concern, he must take the risk of such liability."

The same construction has been repeatedly given to like statutes by the Supreme Court of the United States.

Brine vs. Hartford Fire Insurance Co., 96 U. S., 364.

Connecticut Mutual Insurance Company vs. Cushman, 108 U. S., 51.

Providence Insurance for Savings vs. Jersey City, 113 U. S., 506.

Toledo D. & B. Railroad Co. vs. Hamilton, 134 U. S., 30.

The rights of tort judgment creditors to the protection given in this statute have been frequently passed upon by the Supreme Court of North Carolina in recent decisions, and in every instance the statute has been upheld and the relief therein afforded granted.

Coal Co. vs. Electric Light Co., supra.
Lanston vs. Improvement Co., 120 N. C., 132.
R. R. Co. vs. Burnett, 123 N. C., 214.

In the last named case the Court, referring to the opinions in the last two preceding cases cited, says:

"These opinions are expressly put upon the ground that the mortgages were void as to such claims, and the property stood, so far as such claims were concerned, just as if no mortgage had been made. If this were not so this statute would be a false light held out to such claimant, thinking they had a security when in fact they had none. The Legislature never so intended and we so hold."

We submit that under the statute (Section 1255 of the Code) corporate property embraced in the merger, into whosesoever hands it may come, constitutes a trust fund for the payment of judgments which may be obtained for injury to person or prop-

erty, although the injury may have been caused by the lessor, or the lessee of such property, and more particularly by the successor of the corporation having made the mortgage. Otherwise, the object of the statute could easily be defeated by an agreement between the mortgagor and the trustee and the beneficiaries of the trust, to exempt from the operation of such statute its property, in the interest of persons or mortgage creditors who might be declared to have a first lien upon such property.

It is contended that the property here mortgaged, which is included both in the first and second mortgages of the Greensboro Water Company, and likewise in the mortgage of the 1st. of July, 1896, of the Greensboro Water Supply Company, is set apart by law for the satisfaction of tort judgments, obtained against persons operating and conducting such property thus embraced in said mortgages; and that all mortgages against said property are void as to such judgments, whether they be mortgages given directly by them, or mortgages the payment of which they have assumed by reason of the purchase and consent of mortgagees; that the bondholders are affected with notice of this statute as much so as if it was incorporated in totidem verbis in the mortgage under which they claim. It is a part of their contract and they are bound by it, and no agreement made by the bondholders whereby such property is undertaken to be removed from the operation of the statute is valid in law.

East Tenn., V. & G. R. Co., vs. Frazier, 139 U. S., 288.
Howe vs. Harper, 127 N. C., 356.

It is contended that any contract or understanding made or had by and between the bondholders of the Greensboro Water Company and the Greensboro Water Supply Company, or with the Guadian Trust and Deposit Company, whereby the statutory effect of the intervenor's judgments would be impaired by the lessening of the legal means of their enforcement, would be invalid, inasmuch as it would impair the obligation of the contract, and such an arrangement would be void in law.

U. S. vs. Mayor of New Orleans, 103 U. S. 358, 367.
Cooley's Const'l Limitations, 4th. Ed., 241.
Angel and Ames on Corporations, 7th. Ed., secs. 332 and 333.
Mount Pleasant vs. Beckwith, 100 U. S., 514, 528-29-30-34.

Swain vs. Seamans, 9th. Wallace, 274.

It is sumitted further that the bondholders having participated in the re-organization of the old Greensboro Water Company and merged it into a corporation known as the Greensboro Water Supply Company, and having agreed to the mortgage of July 1st., 1896, (wherein provision is made for the payment of the interest on the said bonds), that the mortgage of July 1st., 1896, is, in contemplation of law, a new mortgage and a waiver of the mortgage of May 10, 1888.

Cook on Stocks and Stockholders and Corporation Laws, 3d. Ed., Sec. 793, and cases cited.

Upon inspection of the judgment roll, it will be seen that these judgments are based upon a cause of action well-recognized by the law of the land, and in accordance with both English and American precedents. And, that the said causes of action are based upon a breach of duty implied and imposed by law, as well as arising from contract, and that the Intervenors had their election to sue in contract, or in *tort*. They chose the latter.

If it were proper for this court to go behind a judgment of the State Court for the purpose of ascertaining whether or not there was a cause of action stated, upon which the final judgment of the State Court was based, or for the purpose of determining by inspection of the judgment roll whether the proceedings in the cause and the complaint in the action show a cause of action, still we submit that this court would reach the same conclusion as did the Supreme Court of North Carolina and Judge Simonton, viz:

That the Intervenors had a cause of action, and that the said same is fully and comprehensively stated in the complaints filed in their said actions againust the Greensboro Water Supply Company as appears from paragraphs 6, 10, 13, 15, 16 and 19 of the complaint in the Fischer Case." (See Record, pages 264 and 269.)

Attention is called to the fact that technical and common law forms of actions are not recognized in the State of North Carolina; that distinctions betweens actions at law and suits in equity and the forms of all such actions are abolished, and there is but one form of action for the enforcement of private rights and the redress of private wrongs, and that action is

denominated a "civil action." (See Code of North Carolina, Section 133.)

"In jurisdiction where all forms of actions have been abolished the inquiry should be not as to the remedy formerly given at common law, but as to the real nature of the right."

Keener on quasi contract, 160.

The defendant Water Company is a *quasi public* corporation subject to the same rules of law as railroad, telegraph, and gas companies, and likewise liable to the public in the same manner to perform all duties imposed by the law upon such corporations.

Griffith *vs.* Water Co., 122 N. C., 206.

In Young *vs.* Telegraph Company, 107 N. C., 384 and 386, the Court says:

"We have no forms of action or technical rule which can prevent a plaintiff upon a statement of facts of his case from recovering all the damages shown to have been sustained. If the facts stated show a breach of contract, and also that the breach is of such a character as to authorize an action *for tort* all the damages for the thing *done* or *omitted* either *ex contractu* or *ex delicto* may be recoverable in on action."

Chitty, in discussing actions on the case (form of action *ex delicto*) and of the injuries for which relief could be had under this form of action, says: "These injuries may be either by non feasance or the omission of an act which the defendant ought to perform, or by misfeasance, being the improper performance of an act which might lawfully be done, or by malfeasance, the doing what the defendant ought not to do, and these respective *torts* are commonly the performace or omission of such act contrary to the general obligation of the law, or the particular rights and duties of the parties or of some express or implied contract between them." Chitty on Pleadings, 11 American Edition, 133.

And in the same volume, at page 383, in stating the requirements of the declarations in actions for *torts*, Mr. Chitty says: "When the plaintiff's right consits in an obligation on the defendant to observe some particular duty the declaration must state the nature of that duty which, we have seen, may be founded either on a contract between parties, or on the

obligation of law arising out of the defendant's participation, character or situation."

The petitionerss in their Brief charge that this doctrine, when applied by the Supreme Court of North Carolina in the cases at bar is new and revolutionary. We beg to call the Court's attention to the case of Robinson *vs.* Threadgill, 35 N. C. 41, which was decided in 1851, in which, by a unanimous Court, the doctrine herein contended for was expressly declared to be the rule of law and action in such cases. Quoting from the opinion in this case:

"The rule is that where the law from a given statement of facts raises an obligation to do a particular act, and there is a breach of that obligation, and a consequent damage, an action on the case founded on *tort* is the proper action."

"Although there be a special contract, the party is not bound to resort to it, but he may declare on the *tort* and *say that the defendant has neglected to perform his duty.* The law raises an obligation on the defendant to do a particular act to-wit, to collect, or return the notes and he was guilty of a breach of that obligation. The plaintiff was given the liberty to consider the *breach of duty* as his gravamen, case was his appropriate remedy, though he might have sued in assumpsit."

In 1844 the Supreme Court of North Carolina, in the case of *Williamson vs. Dickens, 27 N. C., page 260*, in discussing the question of the plaintiff's right to declare in tort for breach of contract, says, "The plaintiff had his election to sue the defendant in assumpsit or in *tort* and he chose the latter." Commenting further upon this right of plaintiff, the Court, then presided over by Thomas Ruffin, Chief Justice, the most distinguished Jurist North Carolina has ever had, and one of the most eminent in American jurisprudence says, "*And all the Court agree that when the plaintiff has an election as to the form of his action, the choice of the action is decisive of the question.*"

The case of *Bond vs. Hilton*, reported in 44 N. C., page 308, was where plaintiffs brought suit in *tort* against the defendant who had taken charge of a cargo under a contract with plaintiff to sell same and report, that by his delay and mismanagement, considerable loss was snstained by the plaintiffs.

The Court below was of the opinion that the plaintiffs could not maintain their action against the defendant in tort and so held; but—

—*Upon Appeal, the Surpeme Court*, through its Chief Justice, says, "Upon the second branch of the inquiry, we are of the opinion the action is properly brought in *tort*. The plaintiff was entitled to *sue in tort*, and if the *evidence* showed that there had been *a breech of duty* on the part of the defendant in performing his contract, the plaintiff would have been entitled to a verdict. This was a matter of inquiry *for the Jury* under the proper instructions of the Court,"

It will be observed from an examination of the reports of the Supreme Court *of North Carolina*, that this doctrine, originating in England, was adopted by the State of North Carolina about sixty years ago, and has been without exception uniformly approved and followed by each succeeding Court up to the present time.

In the case of *Solomon vs. Bates*, 118 N. C., page 315, the Supreme Court expressly ratifies and approves each and every one of the foregoing cases, and adds the following comment, "while breach *of a duty* imposed by law arising upon a given state of facts is a *tort*, and yet even if there had been a special contract, or a statutory provision, the plaintiff might sue for *the negligence, in tort.*"

In reference to the opinion of the Court in *Fisher vs. the Water Company, reported* in 128 N. C., page 375, it will be observed that the Court again re-affirms and adopts the foregoing line of decisions and declares it to be a well settled and established rule of law and practice in North Carolina.

When the Water Company by and with the consent and approval of the petitioners, entered into the contract set out in the Record, it knew or ought to have known, that the well settled rule of law in North Carolina was that the Water Company could be held liable in *tort* for any *negligent omission* to perform the duties undertaken, or stipulated to be done in said contract, and that section 1255 of the Code of North Carolina, then enacted, provided that such judgment, when obtained, would take priority over their mortgages and bonds.—hence we do not see how the petitioners can complain of the application of the same principle to them, which has been invoked for half a century against the citizens of North Carolina.

The Supreme Court of the United States, in the case of Atlantic & Pacific R'y. Co. vs. Laird, 164 U. S., page 399, discussing the difference between causes of actions ex-delicto and excontractu says: "The distinction is this: If the cause of complaint be for an act af omission or non-

feasance, which, without proof of a contract to do what has been left undone, would not give rise to any cause of action (because no duty, apart from contract, to do what is complained of, exists) the... the action is founded upon contract and not upon tort. If, on the other hand, the relation of the plaintiff and defendant be such, *that a duty arises from that relationship* irrespective of contract *to take due care and the defendants are negligent*, then the action is one of *tort*." "So, in the case at bar, there was *a duty* shown independantly of contract, etc., etc."

Our case can be easily brought within the favorable application of this rule, when it is shown and admitted that the defendant Water Company was in the enjoyment of a *franchise* from the City of Greensboro, and by authority of which owed a *duty* to said city and its inhabitahts independent of said contract.

In the case of *Walla Walla vs. Walla Walla Water Co.*, 172 U. S., page 9, Mr. Justice Brown speaking for the Court says: "It is sufficient for the purpose of this case to say, that this Court has too often decided, for the rule to be now questioned, that the grant of a right to supply gas or water to a municipality and its inhabitants, through pipes and mains laid in the streets, upon the condition of the performance of these services by the grantee, is the grant of a *franchise* vested in the State in the *consideration of a performance of a public service.* It is true that in these cases a franchise was granted directly by the State Legislature, *but it is equally clear that such franchises mry be bestowed upon corporations by the municipal authorities.*

Again in *New Orleans Gas Light Company vs. Louisiana Light Mfg. Co.*, 115 U. S., page 650, the Court speaking through Mr. Justice Harlan, says, "The right to dig up the streets and other public ways of New Orleans, and place therein pipes and mains for the distribution of gas, for public and private use, is a *franchise*, the privilege of exercising which, could only be granted by the State, or by the *municipal government* of that city acting under legislative authority."

"We have seen the manufacture of gas and its distribution for private and public use by means of pipes laid, under legislative authority, in the streets and ways of the city, is not an *ordinvry* business in which *every one* may engage, but is a *franchise* belonging to the government, to be granted, for the accomplishment of *public objects*, to whomsoever and

upon what terms, it pleases. It *is a business of a public nature and meets a public necessity* for which the State may make provision." (Italics ours.)

Dillon on Muni. Corp., 3 Ed., Sec 691.

A very able and exhaustive discussion upon the subject of the obligation undertaken by accepting a franchise may be found in *Haugen vs. Albina Light and Water Co.*, reported in 14 L. R. A. page 424, the Court there says; "As the defendant could not carry on the business of supplying water without the *franchise*, the city must have intended in granting such franchises to charge it with *the performance of the duty* it undertook for *the public* by the terms of this incorporation, and the defendant *in accepting the benefits of the grant must have assumed the performance of such duty*, in a word, the acceptance of a franchise under such contention carries with it the corresponding *duty* of *supplying the public* with the commodity which the incorporotion was organized to supply to all persons without discrimination."

To the same effect is the case of Griffith vs. Water Co.; 122 N. C., 206. It is respectfully submitted that the above authorities conclusively show that the Water Company clearly *owed a duty*, independent of the contract, to *perform the obligations which by its chrater and franchise it had undertaken to do.*

Their failure to do so under the foregoing decisions was a *breach of duty*, and at the same time a violation of the contract for which they could be sued *in tort* or contract.

There was an express contract as well as a legal obligation upon the part of the Defendant Water Company to provide and furnish ample protection against fire to the inhabitants of Greensboro, a breach of that obligation and a consequential damage to the respondents, as stated by the Supreme Court of North Carolina in Fisher vs. Water Company, 128 N. C., 375. The Court there says:

"Although action may have been maintained upon a promise implied by law, yet an action founded in *tort* was the proper form of action, and the plaintiff so declared. He stated the facts out of which the legal obligation arose fully, and also the obligation itself, and the breach of it, and the damage resulting from the breach."

(Attention is particularly called to the complaint filed in the Fisher case, found in the Record from pages 261 to 270,

Receiver appeared for the defendant company in said actions as attorney assisted by the able counsel who at present are arguing the case before this court, and who were likewise counsel for the bondholders, having therefrom drawn the bill upon which the United States Circuit Court appointed the receiver.

Further, that when the Superior Court rendered judgment adverse to the defendant company, the cases were prosecuted upon appeal to the Supreme Court of North Carolina and there re-argued; Having thus presented in the State Court every defense to which the company was entitled, and counsel for bondholders could imagine, and the same being decided adversely to it, we respectfully submit that they ought not, in the language of the late Chief Justice Pearson, of the Supreme Court of North Carolina, "be allowed to take two bites at the cherry".

Counsel for appellants in their brief suggest that the mortgages of the new and old company stand upon a different footing with regard to these judgments.

We do not understand that this question is really before the Court, as the Circuit Court did not desire instruction upon that question: It, doubtless, entertained the same view with relation thereto as is expressed in the opinion of Simonton, Judge, in this cause, wherein the Court held, that the new company was a re-organization of the old, and that by assuming the old mortgage debt by contract it became its real debtor and the bond holders its creditors. Should the Court, however, desire to review this branch of the case, we submit for its consideration the following:

First, What relation, in law, does the Greensboro Water Supply Company—the defendant company—sustain to the Greensboro Water Company, and what are the duties and obligations imposed upon, and assumed by, the Defendant Company?

Second, What relation does the Defendant Company occupy and sustain to the first mortgage creditors of the Greensboro Water Company, the payment of whose mortgage debt was assumed by the terms of the re-orgaization, at the time of the sale of the franchise and property of the Greensboro Water Company, to the Defendant Company?

We contend that the Greensboro Water Supply Company is nothing more or less than a re-organized corporation of the Greensboro Water Company, with the same name, except by the addition of the words " and" and "supply", with practically the same incorporators, embracing and operating substantially

the same corporate property, assuming the obligations, the public and private duties and the responsibilities of the old company operating and conducting its business under the franchise of the Greensboro Water Company (the old company), and is, to all intents and purposes, and in fact, the successor of the Greensboro Water Company (See Record, pages 93, 116, 117, and 221).

"When a new form is given to an old corporation or the same is re-organized under a new charter, taking in its new organization the place of the old one, embracing substantially the same incorporators, in the same territory, it will be presumed or held to be a continued existence of the same corporation, although different powers are possessed under the new charter and different officers administer its affairs, and is not, in law and in effect, a new and distinct creation of corporate capacity or liability."

Broughton vs. Pensacola, 102 U. S., 266 and 269.

It is submitted that the bondholders of the Greensboro Water Company occupy the same relations to the judgment claimants that the Greensboro Water Company itself would have occupied, and that the Greensboro Water Supply Company, in contemplation of law, as well as a matter of fact, occupies the same position that was occupied by the Greensboro Water Company; for a sale and transfer of coporate property under the circumstances of this case carry with it an obligation in law that the purchaser will assume the liabilities of the old company, and likewise become responsible to the public "to perform all such duties that would have been and should have been performed by the first corporation but for such sale and conveyance". This the new company undertook to do by executing a deed of trust upon its property and earnings, expressly assuming the indebtedness of the old company. (See Record).

This liability is further emphasized and declared by the Code of North Carolina, Sections 697 and 698, which are as follows:

Section 697. "If a sale be made under a deed of trust or mortgage executed by any corporation on all its works and property and there be a conveyance pusuant thereof, such sale and conveyance shall pass to the purchaser not only the works and property of the corporation as they were at the time of making the deed of trust or mortgage, but any works which the corporatio may at that time and before the sale have constructed, and all other property of which it may be possessed at the time of the sale other than debts due to it. Upon such conveyance to the

purchaser the said corporation shall ipso facto be dissolved and the purchaser shall forthwith be a new corporation, by any name which shall be set forth in said conveyance or in any writing signed by him, and regarded in the same manner in which the conveyance shall be regarded".

Sec. 698. "The corporation created by, or in consequence of such sale and conveyance, shall succeed to all such franchises, rights and privileges and perform all such duties as would have been, or should have been, performed by the first corporation but for such sale and conveyance * * * *."

These provisions of law were enacted by the General Assembly of North Carolina in 1872, and brought forward and re-enacted in the Code of 1883; hence the stockholders, bondholders and other creditors of the Greensboro Water Company acted with full knowledge of the same, and they all joined in suit of Middendorf and others against the Greensboro Water Company, asking for the sale of its plant and consenting to and procuring a reorganization or merger of the new company, and the effect of such a merger or re-organization was to create a novation so far as the creditors of the old company were concerned and to substitute the new one as debtor for it.

> 2d. Cook S. & S., Sec. 669, note 3, 1st Spelling p'r Corporation, Sec. 93, and Friedenwald vs. Tobacco Works, 117 N. C., 544.

The bondholders and creditors of the old water company as party complainants asked for a sale of this property subject to the first mortgage lien of fifty thousand dollars ($50,000) and the sale was made in obedience thereto. The new company forthwith and immediately executed a deed of trust upon its plant and earnings to secure the interest of the first mortgage bonds of the old company, and thereafter the new company annually paid to the first mortgage bondholders of the old company their interest, and the same was by them regularly received. Surely as to the third parties the Water Company cannot deny its creditors, nor the creditors—the first mortgage bondholders of the old company—deny its acceptance of the new company as debtor.

The Supreme Court of North Carolina in the case of James vs. the Railroad Company, reported in the 121, N. C., Reports, p. 523, discusses at length the position which a purchasing company under a second mortgage subject to a prior mortgage occupies after its re-organization, in its relation to the public, and to

the original creditors of the first corporation, and upon that subject says:

"By the sale of the Special Master under the second mortgage, the purchase thereunder and the express assumption of the first mortgage debt binds the purchaser, the Southern Railway Company, for this debt. The Southern is in fact the mortgagor, in its relation to the Central Trust Company, of New York, the mortgagee of the first mortgage, and being in possession of the road, its property and franchise, has a right to run and operate the same, and this property will be held liable to the public for damages".

In Friedenwall vs. Tobacco Works, supra, where the succeeding corporation was sued for the debts of the old corporation, Avery, Judge, speaking for the Court, says:

"As the motives and objects of the old were substantially the same as those of the new association, and the latter was organized merely for the purpose of enlarging its business, it was not necessary to obtain the consent of the creditors of the former company to the change, as their rights continued with such merger or consolidation, the same against the new as against the old corporation."

The law treats the new organization, as to all intents and purposes, as the same body, still answerable for its contracts, although made under a different name. If the old company has ceased to exist and has been merged into the new, it has no separate entity. It is, in law, dissolved and cannot be made a party to this action.

Mr. Justice Day in delivering the opinion of this Court in the recent case of Julian vs. the Central Trust Company from North Carolina, Reported in 193 U. S., page 101, discussing the effect of section 697 of the Code of North Carolina, as applied in the case of James vs. the Railroad, supra, says:

"By the law of North Carolina the title to mortgaged premises is in the mortgagee. The Central Trust Company, the Trustee under the first and second mortgages, was a party to the foreclosure proceedings. It is estopped to dispute the effect of the decree, sale and confirmation, clothing the Southern Railway Company with the full title to the property and franchise to operate a railroad which had theretofore belonged to the Western North Carolina Railroad Company".

This opinion expressly rules the point sought to be raised by the appellants in this case.

CONSTRUCTION OF SECTION 1255 OF THE CODE OF NORTH CAROLINA.

That the mortgages of the old and re-organized Water Companies are void under Section 1255 of the Code of North Carolina as against the judgments of the intervenors.

Upon the construction of Section 1255 of the Code of North Carolina depends the judgment claimant's right to priority in this fund.

It is contended by counsel for petitioners, that the construction put upon this staute by his Honor, Judge Simonton, is a strained construction of that law, and not in hamony with the decisions of the North Carolina Courts.

It has been the policy of the State, through its legislature, since the beginning of its history, to subject the property of corporations to the payment of tort judgments irrespective of mortgages executed by such corporations; in fact, all such mortgages are declared to be void as against torts. As far back as 1798, the General Assembly saw fit to enact a statute (Section 685 of the Code of North Carolina) declaring, among other things, that all conveyances by corporations of their property, either absolutely or upon conditions, should be void as to torts committed prior to or at the time of conveyance, provided suit was instituted against the corporation within sixty days from the registration of such conveyance. The statute, it will be observed, gave releif against the corporation only up to the time of its making a deed of trust, etc., and did not afford any protection to the subsequent tort sufferer as against a recorded mortgage or deed of trust, executed prior to such inquiry. To remedy this condition and bind the property of the corporation for judgments recovered against them for torts committed subsequent to any and all mortgages and deeds of trust already executed, Section 1255 of the Code was enacted, which is in words as follows, to-wit:

Sec. 1255. "Mortgages of incorporate companies upon their property or earnings, whether in bonds or otherwise, hereafter issued, shall not have power to exempt the property or earnings of such corporation from execution for the satisfaction of any judgments obtained in the courts in this State for labor performed (nor for materials furnished such corporations), nor for torts committed by such corporation, its agents or employees, whereby any person is killed or any person or property injured, any

clause or clauses in such mortgage to the contrary notwithstanding."

(The words in brackets have since been eliminated.)

That hte purpose of the Legislature by this enactment was to afford protection for judgments of the nature and class herein contended for, is amply sustained by referencee to the decisions of our own Courts as well as by the decisions of the United States Circuit Court for the Fourth Circuit.

Chief Justice Furches, speaking for the Supreme Court of North Carolina, in the case of Coal Co. vs. the Electric Light Co., 118 N. C., 236, says:

"Section 1255 of the Code was enacted after Section 685 and could not have been intended to give the same relief that the latter gave, and it is equally certain that it was passed for the benefit of the class of persons mentioned in the enactment, and it is the duty of the Court to take into consideration the object for which it was passed and to construe it in that light.

Potters Dwarris on Statutes, page 128.

In construing this statute his Honor, Judge Simonton, speaking for the Circuit Court of the United States, said:

"Upon foreclosure of a railroad mortgage the judgment for personal injury will take precedence over the mortgage in the distribution of the proceeds of sale, and concluding the opinion, says: It appears to us that this judgment and the action thereon is protected by Section 1255 and should be paid in preference to the mortgage deed."

Finance Committee of Pennsylvania et al. vs. Railroad Company et al., 61, Fed. Rep. page 369, exparte Hudson.

This construction of the statute has been approved by numerous other cases by the same learned judge and has never been held in the fourth circuit to the contrary. It is a well settled rule of law that when sale under execution, or otherwise, is made of mortgaged property, the property still remains subject to the old mortgage in the hands of the new creditor, and if the beneficiary in the old mortgage dislikes his new debtor he has ample redress, to-wit: foreclosure; but if he prefers to continue the indebtedness with the new creditor, he must bear whatever burden the law imposes upon the property.

of citizens or inhabitants, are public, or *quasi public*, contracts; and that when such contracts are entered into and assumed by corporations, in consideration of special privileges, rights and franchises, granted either by the State or by a municipal corporation, *the law implies a duty to a person within the class referred to*, who is injured by the *negligent* performance of such duty thus owing, or, a *negligent failure to perform such duty* and such person thus iejured has his remedy at law for such *breach of duty*, or negligence, whether expressed in the contract or not, and, *if he sues in tort*, the *contract* may be considered *in aid* of such right.

In the case at bar our contention is, briefly, that the Water Company, by its acceptance of its franchise and taking by eminent domain, the exclusive use of the streets and public grounds of Greensboro for the purpose of furnishing the city and its inhabitants with a sufficient water pressure at all times to extinguish fires; that the law of the land, then and there, imposed upon the Water Company an obligation to perform this duty. That the Water Company emphasized and made certain this obligation and duty, by *entering into a contract with the City to do* certain things, among which we find the following:

"And said Water Company shall be responsible for all damages sustained by the City or any individual or individuals for any injury sustained from the negligence of said Company, either in the construction or the operation of the plant."

The gravamen of these actions is declared, as authorized by the leading authorities on tortuous actions, Cooley, Addison, Jaggard, Pollock and others.

We state the facts and circumstances out of which the action arose, the common law duty of the Water Company to comply with its public undertakings, its express contract to be liable to any person for negligence in operating its plant, and that for such undertaking has received many thousands of dollars annually from the city; that the Water Company has negligently failed to comply with its contract and to perform the obligations imposed upon it by law, independent of the contract, and that for the negligent non-performance of its legal duty and contract obligations the respondents were damaged.

Upon this statement of facts, which have been adjudged by

a Court and Jury of competent jurisdiction to be true; if the Water Company is not liable in damages for its gross negligence in failing to comply with its duties so owed, and whereby innocent parties have suffered, then it may be truthfully said that water companies enjoy privileges and immunities under the law to which every individual and all other corporations are strangers; and stand as a special ward of legal jurisprudence, defying all the laws of negligence, and ignoring every principle of liability, either in *contract* or *tort*.

Fortunately for respondents and for this Court, the Supreme Court of North Carolina has expressly determined the very points at issue, which results have been reduced to judgment, and that judgment is presented here for payment, with the request that it be accorded the same dignity and consideration by this Court rhat it would receive in the Courts of the State in which it was rendered.

Mr. Justice McKenna, in the case of Freeport Water Company *vs.* Freeport, reported in 180 U. S., page 595, in holding that this Court will be governed by the decisions of the Court of Illinois regarding the status of a water company, and its rights under a contract to furnish water to the inhabitants of a city in Illinois, quotes with approval the language of Mr. Justice Bradley in Burgess *vs.* Seligman, 107 U. S., 20, as follows:

"Since the ordinary administration of the law is carried on by the State Courts, it necessarily happens that by the course of their decisions certain rules are established, which become rules of property and action in the state, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of state constitutions and statutes. Such established rules are always regarded by ths Federal Courts, no less than by the State Courts themselves, as authorative declarations of what the law is."

And discussing further those cases in which a different rule has been established by the State Courts to that obtaining in the Federal Courts, and to which the United States Court is not bound to adhere, this learned Justice, concluding his observations. says:

"But even in such cases, for the sake of harmony, and to avoid confusion, the Federal Courts will lean towards an agreement of views with the State Courts, if the question seems to them balanced with doubt. Acting on these principles, founded as they are on comity and good sense, the

courts of the United States, without sacrificing their own dignity as independent tribunals, endeavor to avoid, and in most cases do avoid, any unseemingly conflict with the well-considered decisions of the State Courts."

AUBREY L. BROOKS,

Solicitor for Respondents.